areas of the country, public power utilities are the best, or even only, choice for providing access to advanced telecommunications capabilities in the manner envisioned under Section 706. That is, like Congress and the FCC, public power utilities seek to deploy advanced telecommunications capabilities in order to stimulate investment, create jobs, enhance education, social and health care services, and promote social justice. The FCC should therefore do everything possible to enable them to succeed.

3. The Commission Should Do Nothing to Disrupt the Competitive Balance in the Electric Power Industry

As APPA noted in its initial comments, although promoting competition in the electric power industry is not a direct responsibility of the Commission, it should be aware of the significant effect that its decisions could have in that area.[41] As BellSouth notes, market distortions caused by asymmetrical regulation cannot be justified in a competitive market, let alone a converging market.

APPA therefore reiterates that it is vital that the Commission recognize that Congress and many states are now struggling to fundamentally restructure the US electricity industry to introduce competition. Given the on-going changes and uncertainty surrounding the ultimate structure of the electric utility industry, and the importance of advanced telecommunications and information technology capabilities to the competitive utility environment, all utilities must be afforded an equal opportunity to utilize their telecommunications infrastructure to maximum advantage. To do otherwise could well tip the balance in the competition between privately-

[41] *In Brown & Williamson v. Food and Drug Administration*, 1998 WL 473320, the Fourth Circuit recently noted that an agency should "determine" the scope of its authority not merely by reference to its enabling legislation but also to other statutes that convey important information about Congressional intent.

owned and publicly-owned electric utilities in a manner that was neither contemplated, intended nor authorized by Congress.

B. Specific Steps that the Commission Should Take

1. Comments Confirm The Need For A Broad Flexible Definition Of "Advanced Telecommunications Capability"

A number of commenters agree with APPA that the Commission's determination of what constitutes advanced services should be informed by the underlying goal of the Act to provide all American consumers the benefits of new telecommunications technologies. Rather than assume that "advanced telecommunications capabilities" consist entirely of high-end technologies that are unlikely to be available on a widespread basis in the near term, APPA advocated that the FCC adopt a flexible definition that encompasses all facilities that are capable of providing services beyond those provided for under its "universal service" rules.

BellSouth agrees, stating that the FCC's expansive responsibility under the Act to stimulate competition in all sectors of the communications market compels it to avoid an overly narrow construction of the term "advanced services." The market for communications services is not a number of discrete segments but rather a continuum from "plain old telephone service" to the most sophisticated, bandwidth-intensive services. Further, as BellSouth notes capabilities that are commonplace among large, sophisticated business users may nevertheless be "advanced" for small business, rural and residential users.[42]

APPA agrees with RPRI, that the best interests of rural Americans are likely to be served by a definition of advanced telecommunications services which remains flexible, non-technology

[42] BellSouth, pp. 10, 12-13.

specific, and end-user defined. As RPRI notes, one cannot assume commonality of use of telecommunications capabilities across rural America. The needs, circumstances, and the current ability to use the technology are too divergent. However, the fact that the need is not uniformly extensive does not justify lagging access, higher costs, or poorer service. Incorporated into the development of policies surrounding equal access to advanced services should be the awareness that equal access, e.g., availability, does not mean ubiquitous deployment. "Every community should have the capability to purchase advanced services as they require, whether it is dedicated broadband Internet access, a continuous presence distance learning network, or a teleradiology application, but the telecommunications services deployed in every community will not be identical.[43]

In the same manner, APPA suggests that the FCC's policies be service-provider neutral, given that traditional service distinctions and regulatory classifications are increasingly breaking down. For example, as was evidenced in the case studies provided in APPA's initial comments, public power utilities are involved in all facets of advanced telecommunications deployment as carriers' carriers, competitive local exchange carriers, interexchange carriers, cable providers, internet service providers, data providers and wireless providers. APPA urges the FCC to focus its efforts on stimulating entry and competition among all interested service providers, including public power utilities.

2. The Commission Should Apply The Clear Language and Intent of The Telecommunications Act

In its initial comments, APPA counseled the FCC to view its charge under the Telecommunications Act to be like that of a doctor -- the Commission first should "do no harm."

[43] RPRI, pp. 3,5.

A variety of commenters echo APPA's suggestion by advising the Commission that, if it simply follows the clear language of the Act, many entities will move forward and deploy advanced telecommunications infrastructure. For example, Cablevision urges the FCC to adopt a general policy that it will not risk inhibiting deployment by stretching the interpretation of ambiguous regulatory requirements to apply them to advanced infrastructure providers.[44]

APPA noted that public power utilities have at least three options for using their advanced telecommunications infrastructure to benefit their communities: (1) Lease dark fiber or bulk telecommunications capacity to telephone companies, cable operators or other private telecommunications carriers; (2) Enter into creative private carrier partnerships with telecommunications providers, customers or other entities, including schools, universities, hospitals or libraries; and (3) Become full-fledged providers of telecommunications services to the public, competing head-to-head with telephone companies, cable operators, transmitters of data and other suppliers of communications services. As APPA indicated, where not prohibited by state barriers to entry, scores of communities around the country are now making advanced capabilities available by one or more of these three options.

APPA's comments documented the legislative history of the Telecommunications Act, and its direct antecedent S.1822, in the 103rd Congress, in which Congress sought to encourage municipal and other forms of public electric utilities to participate actively in the development of what was then called the "National Information Infrastructure." As the Telecommunications Act ultimately reflected, APPA's efforts were successful. To promote competition and diversity in the telecommunications industry, the Senate crafted key definitions and preemption provisions so as to encourage municipal utility involvement in the full spectrum of telecommunications activities.

[44] Cablevision, pp. 5-6.

Specifically, APPA demonstrated that Congress adopted definitions of "telecommunications" and "telecommunications services" that would allow a municipal utility to provide dark fiber and bulk telecommunications capacity on a private carrier or carrier's carrier basis without being subject to the full panoply of common carrier regulations and requirements. In addition, APPA demonstrated that Congress intended that public power utilities seeking to provide telecommunications services were to be free from state and local barriers to entry under Section 253 of the Act. Now, the Commission needs to do little more than apply the law as Congress intended.

3. The Commission Should Act Vigorously to Eliminate All Barriers To Entry

APPA is in complete agreement with the large number of commenters that, like AT&T, stress that "the most important action the Commission can take to speed deployment of advanced telecommunications services is to vigorously implement and enforce the market-opening obligations of the Act."[45] Similarly, APPA agrees with BellSouth that "[t]he public interest is served by ensuring that all competitors have incentives to invest in and deploy advanced services rapidly," and "[c]onsistent with Section 706's demand for prompt action in removing regulatory barriers for the deployment of advanced telecommunications capability, prompt relief should be the Commission's top priority."[46] Furthermore, APPA agrees with BellSouth that:

> Subjecting ILECs -- or any broadband suppliers, for that matter -- to cumbersome regulatory requirements for advanced services is unnecessary and only discourages their full participation in the market, inhibits their incentive to develop innovative service offerings, encumbers their ability to respond to shifting market conditions,

[45] AT&T, p. 37. Ameritech, pp. 4-5; AT&T, p. 37; BellSouth, pp. 4-5, 45-46; GTE, pp. 2, 4, 17; NCTA, p. 2; Nortel, pp, 17-18;RPRI, p. 4; TEC, p. 37; UHOA, p. 4; USA, p. 7; USTA, p. 4; and UTC, pp. 5, 7-8.

[46] BellSouth, pp. 43, 45-46.

> and ultimately delays wide-scale deployment and increases the cost of advanced services for consumers.[47]
>
> * * *
>
> [And,]
>
> To stimulate innovation and investment in advanced services infrastructure, as Congress proscribed, the Commission must eliminate artificial restraints on competition by all participants, including the ILECs, and enable the developing marketplace to select the technologies and service providers that best meet consumer demand.[48]

APPA would reiterate that the FCC should recognize that the principle of free markets encompasses the ability of consumers to choose not to purchase services from the private sector but to enjoy the benefits of local control by satisfying their needs through their own facilities -- as is the case with consumers who elect to purchase electricity from public power utilities.

As APPA demonstrated in its initial comments, public power utilities are not only well-positioned to deploy advanced telecommunications capabilities, but many are already doing so where barriers to entry do not exist. Unfortunately, such barriers do exist in many states. For example, two of the most notorious state statutes are Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995 and Section 392.410(7) of the Revised Statutes of Missouri, which both prohibit municipalities and public power utilities from providing telecommunications services or facilities.[49] State laws such as these have a chilling effect on the rapid deployment of advanced

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[47] BellSouth, p. 4.

[48] BellSouth, p. 5.

[49] Other states that have enacted statutory barriers to municipal entry include Minnesota, Minn. Stat. Ann. § 237.19 (requires 65% super-majority vote); Nevada, 1997 Nev. Stat. 268.086 (prohibits cities with populations of 25,000 or more from selling telecommunications services); Tennessee, Tenn. Code. Ann. § 7-52-406 (1997) (prohibits entities of local government from providing cable service, paging service, security service and internet service); Arkansas Telecommunications Regulatory Reform Act of 1997, § 9(b) (prohibits municipalities from providing local exchange service); and Virginia § 15.2-1500 Virginia Code (except for the Town of Abingdon, the home of a prominent Congressman, local governments cannot lease or sell

telecommunications capabilities, particularly in areas in which public power utilities are the only entities that can feasibly provide or facilitate the provision of competitive telecommunications services. According to UTC, in a fiber optic survey it conducted concerning the leasing of fiber optics, nearly twice as many public power utilities reported state barriers to entry in 1997 (38%) as they reported in 1994 (20%).[50]

As the FCC is aware, municipalities and public power utilities have challenged the Texas and Missouri statutes as an unlawful barrier to entry under Section 253 of the Telecommunications Act. In October 1997, the FCC declined to preempt the Texas law, concluding that it did not have the authority to interfere with the relationship between states and their political subdivisions.[51] The FCC's conclusion was based on its determination that the term "any entity" in Section 253(a) was not sufficiently broad to cover municipalities and municipal electric utilities. The FCC's *Texas Order* is currently being reviewed in the United States Court of Appeals for the D.C. Circuit.[52] A petition to preempt the Missouri law is currently pending before the FCC.[53]

In a recent separate proceeding, the FCC not only held that the term "entity" should be given its broadest possible meaning when necessary to achieve the pro-competitive purposes of the Act, but the Commission also has expressly noted that the term "entity" encompasses

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telecommunications services, equipment or infrastructure, but local governments can sell their physical infrastructure that is in existence and in place by September 1, 1998).

[50] UTC, p. 5.

[51] *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*").

[52] *City of Abilene, Texas, and the American Public Power Association v. Federal Communications Comm'n*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

[53] *In the Matter of The Missouri Municipal League, et al,* CC Docket No. 98-122.

government entities.[54] Now that the FCC has concluded that the term "entity" should be given an expansive interpretation the Commission should move quickly to eliminate state barriers to municipal utility provision of telecommunications.

Curiously, some of the prime advocates of eliminating any and all market barriers to the deployment of advanced services, the ILECS, are among the chief architects of these state barriers to municipal utilities. For example, in the current *NOI* GTE argues:

> [T]he existing regulatory regime targets one class of competitors -- the incumbent local exchange carriers -- with a host of burdensome and unnecessary obligations that impede their ability to innovate, invest, and respond to marketplace pressures. This intrusive and asymmetrical regulation of a single class of competitors, which enjoy no advantage over any other company providing advanced services, is the single biggest obstacle to the reasonable, timely, and widespread deployment of advanced telecommunications capability.[55]

> [R]egulation that favors or disfavors a particular competitor simply because of its status (e.g., ILEC, CLEC, ISP, MVPD) creates destructive marketplace distortions that deter investment and shift the risks of technology and service deployment to the disfavored class of competitors. These distortions, in turn, give rise to constituencies seeking to perpetuate disparate regulation in order to preserve an artificial competitive advantage.[56]

Yet, GTE filed comments opposing the preemption of the Missouri statute that targets one class of potential competitors -- public power utilities-- and prohibits them from providing telecommunications services or infrastructure.[57] It appears that in Missouri, GTE is guilty of attempting to "perpetuate disparate regulation in order to preserve an artificial competitive advantage" by blocking public power utilities from providing telecommunications infrastructure.

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[54] *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, CCBPol 96-17, *Memorandum and Opinion on Remand and Order to Show Cause*, FCC 98-226, released September 26, 1998.

[55] GTE, p. 5.

[56] GTE, p.18.

[57] GTE, Comments in Opposition, CC Docket No. 98-122, August, 13, 1998.

SBC's comments in the current *NOI*, and in the Missouri preemption proceeding, display a similar conflict of reasoning. The disparity of the ILEC's positions between these two proceedings, suggest either a welcome change of heart, or disturbing anti-competitive motivations, that should concern policy makers.

The ILECs' opposition to municipal utility provision of telecommunications is particularly inappropriate given their admission in this proceeding that they do not intend to deploy advanced infrastructure in many of the rural markets that public power utilities seek to serve, until those markets are "economically viable" at some point in the distant future.

Other commenters join APPA in condemning the anticompetitive effect of state laws that effectively prohibit municipal utility entry into telecommunications. For example, in discussing the FCC's failure to preempt the Texas prohibition on municipal utilities, TEC states the Commission has squandered an opportunity to promote competition in those exact areas where universal service is needed most. In doing so, TEC maintains, that the Commission has now tragically condoned implicitly all such laws.[58]

Similarly UTC argues, that aside from the special provisions of the Telecommunications Act dealing with those utilities subject to the Public Utilities Holding Company Act, it was confident that Section 253, on "removal of barriers to entry," would be used by the Commission to eliminate any other state or local regulatory restriction to utility entry into telecommunications. UTC states that based on the FCC's constrained reading of Section 253 in its *Texas Order*, it is very concerned that the FCC's decision has sent a signal to ILECs that they can effectively forestall competitive entry in their markets by lobbying for the passage of state laws that will

[58] TEC, p. 37.

prohibit the direct or indirect participation of municipalities and public power utilities in telecommunications.[59]

APPA agrees with UTC that it should be apparent to the FCC that, if municipal utility entry into telecommunications were not viewed as a threat by the ILECs, they would not be so active in promoting these blatant barriers to entry. UTC argues that these state restrictions have the effect of forestalling competitive entry by third-parties wishing to simply partner with public power utilities for the construction of competitive telecommunications systems.[60] Ultimately, the issue is not about "state rights," but local choice.

For all the reasons discussed above, and in APPA's pleadings in the Abilene and Missouri proceedings, APPA reiterates its plea that the FCC act decisively in striking down such laws, and forcefully affirm that the Telecommunications Act was intended to open the Telecommunications market to competition by "any entity," including municipal utilities.

4. The Commission Should Affirmatively Encourage Public Power Utilities To Engage In Telecommunications Activities

APPA agrees with BellSouth, that the FCC should provide strong leadership to state commissions, and use this inquiry to send a clear message to the states that open markets are the top national telecommunications priority.[61] As TEC notes, the FCC should not be reticent about using its "bully-pulpit" to advance a pro-competitive agenda, particularly when it comes time to criticize legislative or political initiatives that deter new infrastructure development and construction.[62]

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[59] UTC, p. 7.
[60] UTC, p. 8.
[61] BellSouth, p. 6.
[62] TEC, p. 39.

Along these same lines, APPA renews its request that in recognition of the real public benefits that public power utilities are having, and can have, in fostering the rapid deployment of advanced telecommunications capabilities and the availability of advanced services on a competitive basis to all Americans, the Commission should take all appropriate affirmative steps to encourage public power utilities to engage in telecommunications activities.

V. CONCLUSION

APPA submits that it has demonstrated through its comments and reply comments that, public power utilities are uniquely well-suited to foster the rapid deployment of advanced telecommunications capabilities and to facilitate the entrance of new competitive providers through public-private partnerships, particularly in rural areas, in a manner consistent with the underlying goals of the Telecommunications Act and Section 706. In fact, in many areas of the country, public power utilities have existing infrastructure in place that would allow for the immediate introduction of advanced services on a competitive basis.

Significantly, public power's participation in providing advanced infrastructure can effectively advance both the goals of universal service and competition. Unlike some incumbent rural carriers that eschew competition and seek access to increase universal service subsidies, public power utilities, if not denied the opportunity, will deploy advanced capabilities in rural areas and help lower the costs of universal service in the process. Public power has a proven commitment to rural areas, seventy-five percent of APPA's members serve rural communities with populations of less than 10,000. As entities of local government over seen by elected officials, public power utilities are directly responsive and accountable to the people that they serve, and are therefore inherently focused on providing the necessary infrastructure and capabilities that their communities need to flourish.

The vast majority of commenters support the idea that there are a large number of potential providers of advanced telecommunications infrastructure. These commenters echo APPA's observation that, if the FCC simply follows the clear language of the Act, many entities, including public power utilities, will move forward and deploy advanced telecommunications infrastructure. Further, APPA is in complete agreement with the large number of commenters that say that the most important action the Commission can take to speed deployment of advanced telecommunications services is to implement and enforce aggressively the market-opening obligations of the Act. Specifically, the FCC should vigorously apply its preemption authority under Section 253 of the Act to remove all state and local barriers to entry by "any entity," including public power utilities. In the end, the FCC's rules should embrace competitive neutrality and local choice.

APPA respectfully urges the Commission to take action on this *"Notice of Inquiry"* in accordance with the views expressed in these reply comments.

Respectfully submitted,

James Baller
Sean Stokes
Lana Meller
THE BALLER LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300

October 8, 1998

CERTIFICATE OF SERVICE

I, Sean Stokes, hereby certify that on this 8th day of October 1998, I caused copies of the foregoing Reply Comments to be served on the parties on the attached Service List, by hand delivery.

By Hand Delivery:

Honorable William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Honorable Harold W. Furchtgott-Roth,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Thomas Powers
Legal Advisor to Commissioner Kennard
Federal Communications Commission
1919 M Street, N.W. Room 814
Washington, D.C. 20554

Anita Walgren
Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Paul Misener
Legal Advisor to
Commissioner Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Kyle Dixon
Legal Advisor to Commissioner Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

ITS, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Honorable Michael K. Powell, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

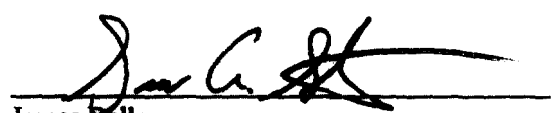
Honorable Gloria Tristani, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Mr. John Nakahata, Chief of Staff
Federal Communications Commission
1919 M Street, N.W., Room 818
Washington, D.C. 20554

Paul Gallant
Legal Advisor to Commissioner Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Ms. Kathryn Brown, Bureau Chief
Common Carrier Bureau
2025 M Street, N.W. Room 6008
Washington, D.C. 20554

John W. Berresford
Senior Anti-trust Attorney
Industry Analysis Division
Common Carrier Bureau, Room 399-A
2033 M Street, N.W.
Washington, D.C. 20554



James Baller
Sean A. Stokes
Lana L. Meller
THE BALLER LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202)833-1180 (fax)
SStokes@baller.com (Internet)

Attorneys for the American Public Power Association

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